INDEX

316-561—68——1

CITATIONS

Cases:

Miscellaneous:

Miscellaneous—Continued

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 51

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH FRANCIS NARDELLO AND ISADORE WEISBERG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court dismissing the indictment (A. 20–25) is reported at 278 F. Supp. 711.

JURISDICTION

The order of the district court was entered on January 2, 1968 (A. 25). The notice of appeal was filed on January 30, 1968 (A. 26–27). This Court noted probable jurisdiction on June 17, 1968 (A. 28). The jurisdiction of this Court rests on 18 U.S.C. 3731.

QUESTION PRESENTED

Whether 18 U.S.C. 1952, making it a federal crime to travel in or use the facilities of interstate commerce

to promote "extortion" in violation of state (or federal) law, applies to extortionate conduct which is captioned "blackmail" rather than "extortion" in a state penal code.

STATUTE INVOLVED

18 U.S.C. 1952 provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Sections 4802, 4803 and 4318 of the Pennsylvania Penal Code are set forth in Appendix A, *infra*, pp. 27-28.

STATEMENT

On November 30, 1966, several indictments were returned in the United States District Court for the Eastern District of Pennsylvania, charging appellees and others with the federal offenses of traveling interstate and conspiring to travel interstate in order to promote extortion under state law, in violation of 18 U.S.C. 1952 and 371.[1] The indictments alleged that the defendants traveled in interstate commerce (from Chicago to Philadelphia in two of the indictments and from New Jersey to Philadelphia in the third indictment) to promote an unlawful activity, blackmail by injury to reputation and business in violation of Section 4802 of the Pennsylvania Penal Code and blackmail by accusation of a heinous crime in violation of Section 4803 of the Pennsylvania Penal Code. As the scheme was more fully detailed in the conspiracy counts, one of the defendants would lure the intended victim into a "compromising position" (A. 13), and later other defendants would represent to him that they were police officers who either had a warrant for his arrest or had other authority for his immediate arrest (A. 10, 12, 16). One of the overt acts alleged is that the defendants actually obtained $5,000 from a victim (A. 11).

On motions of the appellees (A. 18–19), the district court dismissed the indictments.[2] The court ruled that

---

[1] Appellee Nardello was named in three indictments (A. 9–17) and appellee Weisberg in two (A. 9–11, 15–17).

[2] The other defendants, including one defendant who is a fugitive (Kaminsky), did not join in the successful motions to dismiss. The indictments were dismissed only as to appellees (A. 2, 6, 8).

318-561—68——2

the term "extortion" in violation of state law, as used in Section 1952 of the federal Criminal Code, the so-called "Travel Act", was intended to "track closely the legal understanding [of the word] under state law, and was not designed to be more generic in scope" (A. 22). From this premise the court concluded that prosecution under the federal statute is confined to instances where a defendant has traveled into Pennsylvania with the intent to violate the section of the Pennsylvania Penal Code specifically denominated "Extortion." In Pennsylvania, the statute entitled extortion is applicable only to the conduct of persons holding public office (18 Pa. Stat. 4318, *infra*, App. A, p. 27). Acts of private persons in obtaining money through threats are captioned "blackmail" under Pennsylvania law (18 Pa. Stat. 4801, 4802, 4803, *infra*, App. A, pp. 27–28). Rejecting the analysis of various state courts (A. 22–23), the court below concluded that Pennsylvania does not consider the conduct here involved as "extortion", and held, accordingly, that the indictments failed to charge extortion under state law within the meaning of 18 U.S.C. 1952.

SUMMARY OF ARGUMENT

I

When it enacted the Travel Act (18 U.S.C. 1952) in 1961, Congress regarded it as a major federal effort to combat organized crime by closing the channels of interstate commerce to persons who engage in certain unlawful activities in which the syndicates had been shown to specialize. In making it a federal crime to enter a state with the intention to carry on "extor-

tion" in violation of the laws of that state, Congress was using that term to describe a category of coercive exactions, and not as confined to the ancient common law concept of a public officer's acceptance of unauthorized fees. The statutory phrasing must either be accepted in its ordinary, conventional, and generic sense, or else the varieties in terminology in modern penal codes will strip the statute of applicability in approximately one-third of the states where extortionate activities are made punishable under titles other than "extortion".

Section 1952 refers to state law because of the congressional purpose of supplementing enforcement of state laws which the mobile modern criminal was able to violate with practical impunity by slipping back and forth across state boundaries. Neither the language of the statute nor its purpose supports a reading that activities which are not classified as "extortion" *eo nomine* in the state code are not embraced within the congressional ban, although they are extortionate and are in fact punishable under state law, but under a different name. In light of the federal interest in undermining the power of national crime syndicates, it is reasonable to construe the term "extortion" in Section 1952 as having the independent significance of referring in a comprehensive, generic sense to any state laws which proscribe the kind of activity which concerned Congress.

II

Should the Court decide that "extortion" was not used generically, it should be construed as at least

including "blackmail", which has long been regarded as its synonym. Pennsylvania as well as a number of other states have followed the natural usage of treating "extortion" and "blackmail" as interchangeable concepts, and their statutes and judicial decisions have done so. This alternative construction would at least preserve the applicability of the statute in those states which outlaw the conduct alleged in this case as "blackmail."

ARGUMENT

I

CONGRESS USED THE TERM "EXTORTION" IN ITS GENERIC SENSE, AS CONNOTING A TYPE OF ACTIVITY WHICH, IF ACTUALLY PROSCRIBED BY STATE LAW, MAY NOT BE CARRIED ON BY RESORT TO INTERSTATE COMMERCE

The Travel Act, 18 U.S.C. 1952, bans anyone from interstate travel to further unlawful activities, including extortion "in violation of the laws of the State" where the act is committed. The issue in this case arises from the fact that Congress did not undertake in the statute to define "extortion".

At common law the term "extortion" designated the crime committed by a public officer who under color of his office took money or property to which neither he nor his office was entitled. 3 Wharton, *Criminal Law and Procedure* (Anderson ed.) §§ 1392–1395, pp. 789–793; *United States* v. *Laudani* 134 F. 2d 847, 851, n. 1 (C.A. 3), reversed on other grounds, 320 U.S. 543.[1] Over the centuries and

[1] There are, however, some indications that extortion by a non-official was also a common law misdemeanor. Winder, *The Development of Blackmail*, 5 Modern L. Rev. 21, 30; 2 Russell, *On Crime* (12th ed.) 867.

sparked by statutory replacement of common law crimes, the concept of "extortion" has been expanded to include any obtaining of money or thing of value from another with his consent induced by the wrongful use of force, fear, or threats. This is the generally accepted modern meaning of the term.[4] Indeed, in the Hobbs Act, 18 U.S.C. 1951(b)(2)—the antiracketeering legislation which has been described as the extortion statute "best known to federal legislators" (*Postma* v. *International Brotherhood of Teamsters*, 337 F. 2d 609 (C.A. 2))—Congress had defined "extortion" in accordance with contemporary understanding.

In some jurisdictions like Pennsylvania, however, such wrongful conduct when committed by a private person is described, not as "extortion", but as "blackmail". 3 Wharton, *Criminal Law and Procedure* (Anderson ed.) § 1396, p. 794. And in other codes, this same type of conduct is made criminal under other labels such as theft, coercion, or robbery. (See App. B, *infra*, pp. 29–30). The question at issue here is whether Congress used the term "extortion" in Section 1952 to comprehend all activities which are extortionate in the commonly accepted sense of the word and which are

[4] See, *e.g.*, 3 Wharton, *Criminal Law and Procedure* (Anderson Ed.) §§ 1396–1399, pp. 793–797; Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84; *United States* v. *Dunkley*, 235 Fed. 1000 (N.D. Calif.); see also, A.L.I., *Model Penal Code*, Section 223.4, *Theft by Extortion* (Proposed Official Draft, 1962); A.L.I., *Model Penal Code*, Section 206.3, *Theft by Intimidation* (Tent. Draft No. 2, 1954); *Rutkin* v. *United States*, 343 U.S. 130; *People* v. *Burt*, 45 Cal. 2d 311, 288 P. 2d 503.

also unlawful in the state where committed, irrespective of the label affixed in the state penal code. We dispute the district court's view that, since the statute speaks of "extortion * * * in violation of the laws of the State in which committed", the state terminology must govern—so that Section 1952 applies only to activities specifically labelled extortion under state law. Neither the language of the statute nor its purpose justifies the reading given it below. Quite to the contrary, Congress intended that the term "extortion" operate in its generic sense according to modern usage. The proper inquiry, we submit, is whether the intended extortionate acts of the defendant are prohibited by state law. If so, interstate travel in aid of such acts is prohibited by Section 1952 whether the state for its purposes has elected to classify them as extortion, blackmail, intimidation, or under any other equivalent term.

A. A NARROW CONSTRUCTION OF THE TERM "EXTORTION" WOULD UNJUSTIFIABLY FRUSTRATE THE CONGRESSIONAL OBJECTIVE OF BANNING INTERSTATE TRAVEL IN AID OF EXTORTIONATE ACTIVITIES FREQUENTLY CARRIED ON BY ORGANIZED CRIME

Section 1952 is the product of congressional response to problems of interstate racketeering underscored by the Department of Justice in 1961. There can be no doubt that neither the Attorney General, in proposing the bill,[5] nor Congress in enacting it,

[5] "This law has the broadest scope and the greatest potential of the new antiracketeering statutes." Kennedy, *The Program of the Department of Justice on Organized Crime*, 38 Notre Dame Lawyer 637, 639 (1963).

understood "extortion" in its ancient common law sense, as confined to public officers. The statute on its face demonstrates the sweep of congressional concern: "whoever" crosses state lines or uses interstate facilities to carry on extortion is guilty of a federal crime.* Such language plainly includes private persons as well as public officers, and should not be given an unnaturally narrow construction. Cf. *United States* v. *Fabrizio*, 385 U.S. 263, 266-267. Furthermore, joined in the same clause with extortion is an offense which has as its normal focus the corruption of public officers: interstate travel to promote "bribery" is also forbidden. In this context, reading "extortion" as confined only to acceptance of unauthorized fees by public officials, in states which retain that classification, would render the "extortion" branch of the clause practically superfluous. Moreover, the other "unlawful activities" specified, such as liquor violations and gambling, had no common law bounds; reference to these types of crimes unmistakably reveals that Congress was not concerned with common law concepts but with present day meanings.

The legislative history confirms this interpretation. The primary purpose of the bill was directed, not at the misfeasance of public officials, but at organized crime. The bill which ultimately became Section 1952 (S. 1653, 87th Cong., 1st Sess.) was one of a series of

*As the court below noted (A. 21), Congress, after conference (see H. Conf. Rep. No. 1161, 87th Cong., 1st Sess.), rejected a House amendment which would have limited the reach of the statute to extortion (or bribery) "in connection with" the other enumerated crimes: gambling, liquor, narcotics, and prostitution offenses.

measures which were part of the Attorney General's legislative program to combat organized crime and racketeering.[7] See *United States v. Fabrizio*, 385 U.S. 263. It was introduced under the title "Interstate and foreign travel in aid of racketeering enterprises." The Senate Report quoted the testimony of the Attorney General that "only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials. So we believe that the Federal Government has a definite responsibility to move against these people and limit their use of interstate commerce." The report also quoted from a letter of the Attorney General: "Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity." S. Rep. No. 644, 87th Cong., 1st Sess., pp. 3–4. See also, H. Rep. No. 966, 87th Cong., 1st Sess., pp. 2–5.

Extortion had long been known to be one of the major sources of income for organized crime. See, e.g., S. Rep. No. 307, 82d Cong., 1st Sess., pp.

[7] See generally Miller, *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 Duquesne L. Rev. 181 (1963); Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 Brooklyn L. Rev. 37 (1961).

[8] The differences between the Senate and House versions of the bill were resolved at a conference. See note 6, *supra*, p. 9.

1–2.[9] The bill was thus primarily designed to dry up the "clandestine flow of profits"[10] reaped by organized crime from activities illegal under state law. Nowhere in the legislative history is there any suggestion that this statute, which was confidently viewed as an effective weapon against a national problem, would be rendered inapplicable to extortionate activities in states which use the caption "extortion" only with reference to public officials.

Section 1952 manifests a congressional judgment that the ease with which syndicate operatives could effectively flout state laws in certain fields constituted a national problem. The Travel Act was expressly designed to assist states in enforcing their local laws against the types of activities that Congress viewed as filling the coffers of organized crime.

It would defeat that purpose to allow the peculiar variations of state terminology to disrupt the objective of the federal statute. Yet this is precisely the consequence of the decision below. To illustrate: In *United States* v. *Schwartz*, Nos. 16465, 16466 (C.A. 7), decided July 12, 1968, the defendants were charged with interstate travel to promote extortion in violation of Title 76, Ch. 19, Section 19–1 of the Utah Code, which provides that "[e]xtortion is the obtaining of

[9] At present, organized crime commonly uses extortion to assist it in "loan-sharking" (its second largest source of revenue), infiltration of legitimate businesses, and labor racketeering. See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, 3–5 (1967).

[10] S. Rep. No. 644, 87th Cong., 1st Sess. p. 4 (quoting the Attorney General).

property from another with his consent induced by a wrongful use of force or fear." The criminal scheme there was essentially the same as that spelled out in the instant indictments. Except for the fact that the statutory label in Utah for this conduct is "extortion" rather than "blackmail", as in Pennsylvania, the laws of both states, without further distinction, forbid this conduct. No explanation appears why Congress should have wished to support enforcement of Utah's statute on this problem, but to leave interstate commerce available to those who would violate Pennsylvania's essentially indistinguishable state law aimed at the same problem.

If this were an isolated disparity, perhaps Congress could be charged with an oversight; but that is not the case. Thus, focusing on the precise form of conduct alleged here, it has been said that "the threat to accuse another of any crime is expressly included in nearly every American extortion statute." A.L.I., *Model Penal Code,* Section 206.3, Comment 5, p. 76 (Tent. Draft No. 2, 1954). Yet, as the same source summarized, these proscriptions "in present law are designated as extortion, blackmail, demanding by menaces and robbery * * *". *Id.,* Comment 1, p. 74.[11] See, *e.g., McIntosh* v. *United States,* 385 F. 2d 274 (C.A. 8) ("robbery in the third degree"). The American Law Institute in 1954, in its draft of a Model Penal Code, labeled the modern concept of extortion as "Theft by Intimidation." (See Section 206.3, *supra.*) When Illinois revised its criminal code in 1961, that state

[11] We have categorized the various state statutes in Appendix B, *infra,* pp. 29–31.

adopted substantially the same approach. Instead of the separate extortion statute which it previously had, Illinois included extortion in a provision of the general *theft* statute by a subsection which provides that "[a] person commits theft when he knowingly obtains by threat control over property of the owner." "Threat" was defined to include the methods of intimidation commonly considered to be elements of extortion. Illinois Criminal Code of 1961, §§ 15–5, 16–1, S.H.A. ch. 38, §§ 15–5, 16–1. (See, also, App. B, *infra*, p. 30.) Both before and after 1961, the same extortionate conduct violated Illinois law. Congress should certainly not be held to have intended that a state which adopted the arrangement and classification of a modern criminal code would thereby remove itself from the protection of a significant anti-racketeering statute.

Congress did not intend to close off criminally bent travel into some states but not into others which prohibit the same acts, merely because their draftsmen employed different terminology in their criminal codes. A reading of the congressional hearings and reports reveals concern about categories of crime, not preoccupation with captions. To be faithful to the congressional purpose, we submit, what is determinative must be whether the conduct is within the generic connotation of "extortion", as Congress used the term, *and* whether the activity is prohibited by state law. It should make no difference that the state may list the crime under "blackmail", or some other heading.

B. NO CONFLICTING POLICY OR LANGUAGE IN THE STATUTE COMPELS THE STRAINED READING GIVEN BY THE COURT BELOW

The district court felt obliged to reach the result it did because the language of the statute speaks of activities, including extortion, "in violation of the laws of the State in which committed" and because it had been recognized that the content of state crimes may vary from state to state (A. 21-22). Nothing in this language, however, or in its underlying purpose, conflicts with the congressional usage of "extortion" in its generic sense, applicable wherever extortionate acts are made punishable by state law.

As we have seen, Section 1952 was drafted and enacted because the mobility of modern racketeers gave them a practical advantage in carrying on certain highly profitable types of illicit activities while avoiding arrest or prosecution in the state whose laws were actually violated. The measure sought to strike at the source of this advantage by closing the channels of interstate commerce through which such persons adroitly conducted their operations. Because the avowed purpose was to plug the breach in effective state enforcement, Congress related the activities banned to violations of the laws of the state in which they take place. But the court below went astray in ignoring the clear federal interest at stake here: it was precisely because organized crime presents a problem of national dimension that concerted federal intervention was found necessary. And in analyzing and discussing this section the focus was on the categories of activity which, *across the nation*, attract the attention of the organized, professional criminal.

Thus, the statute reflects an independent federal concern (see *McIntosh* v. *United States*, *supra*, 385 F. 2d at 278) about certain *types* of activity, while recognizing as a practical matter that the problem is not as pressing where the particular state involved has not seen fit to make a specific form of that conduct illegal.

The district court seized upon one exchange in the legislative hearings on the bill [17] and from it extrapolated an inaccurate generalization (A. 21–22). The hypothetical situation being discussed involved a gambler who operated a dice table in Nevada, where such a business is lawful, and then sought to open a similar venture in Colorado, where it would not be. It was conceded that the lawfulness of his business in Nevada would control the permissibility of his first instance of interstate travel. From this the court below inferred sweepingly that all statutory terms in Section 1952 must "track closely the[ir] legal understanding under state law" and not be "more generic in scope" (A. 22). This conclusion does not follow.[18] Most significantly, in the facts of the hypothetical example, the traveler's activity was lawful where engaged in, while in the case at

[17] *Hearings on H.R. 6572 etc. before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess., pp. 340–341 (May 1961) (testimony of Assistant Attorney General Miller).

[18] In trying to relate this example to the case at bar, the court overlooked the fact that the hypothetical traveler's first trip to Colorado was agreed to fall outside this statute because an essential element under Section 1952(b)(*1*) is that the traveler must be conducting an *unlawful* gambling "*business*", and in the hypothetical the illegal business had not yet been established. Under (b)(*2*), involved here, however, even a single instance of illegal extortion satisfies the statute.

bar, appellees' conduct undeniably violated Pennsylvania law. Thus, to say that the statute does not reach interstate travel by one carrying on a lawful type of "gambling" is quite different from establishing that "gambling" for purposes of the federal statute is rigidly controlled by what Nevada defined gambling—lawful and unlawful—to include. For example, if the Nevada statutes explicitly permitted operation of a dice parlor under its Public Amusements code, and never used the term gambling, it would nevertheless be to that code to which the federal law would direct our attention to test the lawfulness of the hypothetical traveler's trip to Colorado. And conversely, we submit, if Nevada prohibited the conduct of a dice game (or a lottery) under a statute banning "Public Nuisances," and did not use the term "gambling" in the proscription—or its caption—, Section 1952 would include that conduct under the federal statute's description of "gambling". Nothing in the exchange relied on by the court below, or elsewhere in the legislative history, undermines this clearly intended understanding.

In referring to congressional awareness that the content of laws governing "gambling" would vary from state to state, and inferring from this that "extortion" as used in Section 1952 comprehends only an offense so described by the state involved, the district court misapprehended the purpose and effect of making state norms controlling. The objective of assisting state law enforcement is reflected in the decision to withhold federal penalties for conduct which is not an offense at all under state law. Respect

for a state's decision to allow certain forms of gambling to take place does not fairly imply, however, much less demonstrate, that the federal statute fails to reach the forms of gambling that are made illegal, albeit under a different name. An example that parallels the case at bar will illustrate this point: if a state in its chapter dealing with "Gambling" outlawed only operating a dice parlor or a poker game or a roulette wheel, but in a chapter regulating "Public Amusements" allowed horse racing while banning off-track bookmaking, the reasoning of the court below would render Section 1952 inapplicable to travel in aid of the bookmaker's enterprise. "Gambling" in that state would be held to have a distinct meaning not including "bookmaking," elsewhere made punishable. Yet, throughout the congressional hearings, this type of activity was discussed as the archetypical illustration of the interstate "gambling" the section was designed to halt.[14]

Turning, then, to "extortion," the result below may be seen to be in error for the same reason. We would agree, for example, that if by state statute, whether labelled blackmail or extortion, a crime is committed only when money or property is extracted by threat of force, then travel to that state in order to make threats to accuse a person of an infamous crime

[14] In California, for instance, laws regulating the generic subject of "gambling" are arranged in a chapter entitled "Gaming". Calif. Penal Code § 330 *et seq.* And Section 337a outlaws "bookmaking" without using the word "gambling"—the term Congress employed in the Travel Act to include, *inter alia*, bookmaking.

would not be an offense under 18 U.S.C. 1952. Such an interpretation would give full force to the congressional purpose to rest the applicability of Section 1952 on a finding that the particular activity sought to be carried on is unlawful under the laws of the state where the conduct will take place.

But where the conduct is extortionate in the federal, generic usage—like "gambling" in the examples above—*and* where the state does make it unlawful, Section 1952 is by its terms and its purpose applicable—just as it would be applicable to the interstate bookmaker just discussed. Only in this way is the statute saved from the tyranny of mere labels, and only in this way is the anomaly of the result below avoided.

In summary, the term "extortion" in Section 1952, when properly understood, comprehends any provision of state law forbidding extortionate activities, irrespective of the caption given the relevant provision or its location in the state penal code. There is no necessity to read into the section the peculiar variations of state terminology in order to give effect to the public policy of a state. Any other construction would turn what was regarded as a nationally effective weapon against organized crime into a hollow charade of no significance in the approximately one-third of the states (App. B, *infra*, pp. 29–30) which

happen not to call all extortionate activities "extortion".[15]

II

AT THE VERY LEAST, THE TERM "BLACKMAIL" IS SO COMMONLY USED AS A SYNONYM FOR EXTORTION THAT ACTIVITIES LABELLED "BLACKMAIL" BY A STATE ARE PROPERLY DEEMED "EXTORTION" IN VIOLATION OF THE LAWS OF THE STATE IN WHICH COMMITTED UNDER 18 U.S.C. 1952

A. "BLACKMAIL" IS A GENERALLY RECOGNIZED SYNONYM FOR "EXTORTION"

Even if the Court should conclude that Section 1952 does not use the term "extortion" in its comprehensive, generic sense, the indictments in the present case ought still to be reinstated. If some significance is to be attached to the state denomination of an offense, we submit that at least where a state uses the expression "blackmail," this classification should be regarded as merely a synonym for "extortion". Extortion long ago lost its narrow common law denotation as limited to acts of public officers and the term has generally

[15] In *McIntosh* v. *United States*, *supra*, the court of appeals upheld a prosecution under this section even though the Missouri statute involved classified the extortionate activities engaged in as "robbery in the third degree" rather than as "extortion." The court observed, in a passage materially misquoted by the court below (A. 22): "Reference to state law is necessary only to identify the type of unlawful activity in which the accused was engaged." 385 F. 2d at 276.

been accepted as covering both common law extortion and blackmail (see pp. 6–7, *supra*).[16]

As early as 1864 it was said that "[i]n common parlance, and in general acceptation, [blackmail] is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not infrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies or the crimes of the victim." *Edsall* v. *Brooks*, 26 How. Pr. 426, 431–432; see, also, *Mitchell* v. *Sharon*, 51 Fed. 424, 425–426 (N.D. Calif.); *Hess* v. *Sparks*, 44 Kan. 465 (1890); 8 R.C.L. § 315, pp. 293–294 (1915); Comment, *A Study of Statutory Blackmail and Extortion in the Several States*, 44 Mich. L. Rev. 461 (1945). As a result, it is not surprising that the terms blackmail and extortion have been freely interchanged. For example, 18 U.S.C. (1940 ed.) 250 was entitled "Extortion by informer" and its predecessor statute was treated as an extortion statute by this Court in *Sexton* v. *California*, 189 U.S. 319. Yet in the 1948 revision of the criminal code, this

[16] In this respect, extortion is similar to "arson", which at common law was limited to the burning of dwellings but which is now generally used by lawyers and laymen to apply to the willful burning of other types of buildings. In 1965, Congress added "arson" to bribery and extortion as offenses considered unlawful activities under Section 1952(b)(2). See 79 Stat. 212. The examples of the type of incendiary burning meant to be covered clearly demonstrate that the statute applies in the modern sense, to commercial structures. See S. Rep. No. 351 and H. Rep. No. 264, 89th Cong., 1st Sess.

statute was relabeled "blackmail". See 18 U.S.C. 873. In Washington the statutes entitled "extortion" and "blackmail" overlap. Revised Code of Washington, §§ 9.33.010, 9.33.050. In Ohio, one statute is labeled "blackmail" (Ohio Revised Code 1953, § 2901.38) while another prohibiting similar conduct is entitled "extortion" (Ohio Revised Code 1953, § 2907.01). See, also, 1909 New York Penal Law §§ 851, 856; Montana Revised Code §§ 94-1601, 94-1609. Legal opinions also frequently do not distinguish between these two terms. See *People* v. *Mahumed*, 381 Ill. 81, 44 N.E. 2d 911, 912; *Salley* v. *United States*, 306 F. 2d 814 (C.A. D.C.); *Slater* v. *Taylor*, 31 App. D.C. 100; *United States* v. *Local 807*, 118 F. 2d 684, 687-688 (C.A. 2), affirmed, 315 U.S. 521; *United States* v. *Compagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867; *People* v. *Williams*, 59 Pac. 581. Legal writers also draw no distinction. Williams, *Blackmail*, [1954] Criminal Law Review 79; Winder, *The Development of Blackmail*, 5 Modern L. Rev., 21, 23-24. In this light, even minimal regard for the congressionally intended scope of Section 1952 would warrant interpreting a state's proscription of "blackmail" as included within the federal usage of "extortion".

B. THE LAW OF PENNSYLVANIA TREATS "BLACKMAIL" AS SYNONYMOUS WITH "EXTORTION"

Pennsylvania, where the instant prosecutions arose, follows the same approach. Thus, the two Pennsylvania "blackmail" statutes, 18 Pa. Stat. 4802 and 4803, which appellees were charged with traveling in interstate commerce to violate, are entitled "Blackmail by

injury to reputation or business" and "Blackmail by accusation of heinous crime," respectively (App. A, *infra*, pp. 27–28).[17] Both, however, make an intent to "extort" essential elements of the defined crimes. Section 4802, moreover, speaks alternatively of an intent to "levy blackmail, or extort money." Further evidence of the interchangeability with which the terms are used in Pennsylvania appears from the history of these statutes. Prior to the enactment of the 1939 Penal Code, the offenses here at issue were listed under a general caption "Threats Extortion or Blackmailing". The predecessor of Section 4803 was 18 Purdon's Pa. Stat. § 2933 (1936) entitled "Extortion by threats to accuse of an infamous crime," while the forerunner of Section 4802 was 18 Purdon's Pa. Stat. §§ 2931, 2932 (1936) captioned "Penalty for Blackmailing" and "Levy or attempting to levy blackmail." It is thus clear that the Pennsylvania statutes have made no deliberate or meaningful distinction between the terms "extortion" and "blackmail".[18]

---

[17] There is some authority that "extortion" first began to develop as a modified form of robbery in the context of a threat to accuse of an infamous crime, as alleged in these indictments. See Michael & Wechsler, *Criminal Law and Its Administration* (1940), p. 384, n. 4.

[18] The Pennsylvania Supreme Court has recently held that a heading prefixed to a criminal statute does not limit its application or control its construction. *Commonwealth* v. *Shafer*, 414 Pa. 613, 202 A. 2d 308 (1964).

In addition, we point out, in the codifier's list of cross-references following 18 Pa. Stat. 4318—the "Extortion" statute dealing with public officers' receipt of unauthorized fees, which the court below found was the only crime of "extortion" recognized in Pennsylvania—there appears a reference to, *inter alia*,

And despite the strained efforts of the court below to avoid the consequences of the Pennsylvania decisions (A. 22–23), it is also clear that the courts in Pennsylvania use the terms as synonyms. In *Commonwealth* v. *Nathan*, 93 Pa. Super. 193, 197, for example, the court said:

> In common understanding, blackmail and extortion describe the same conduct. While extortion at common law was an offense committed by an officer under color of his office, the term has a broader significance in modern legislation and applies to persons who exact money either for the performance of a duty, the prevention of injury, or the exercise of influence. It covers the obtaining of money or other property by operating on fear or credulity or by promise to conceal the crimes * * *.

And in *Commonwealth* v. *Burdell*, 380 Pa. 43, 48, 110 A. 2d 193, the court described "extortion" as obtaining property with the consent of the victim "induced * * * by the threat of some exposure or the making of some criminal charge * * *." In *Commonwealth* v. *Downer*, 159 Pa. Super. 626, 49 A. 2d 516, the court was confronted with a scheme indistinguishable from that charged here; recognizing the essential identity of extortion and blackmail, it upheld a conviction for violation of 18 Pa. Stat. 4803 (the statute presently entitled "Blackmail by accusation of heinous

---

Sections 4802 and 4803 as treating "Extortion by others than public officers." See, also, 36 Pa. Stat. 2293 ("Extortion from travelers by road or highway workmen").

crime.") under an indictment which charged "extortion by accusation of heinous crime."[12] Indeed, the single decision relied on by the court below, *Commonwealth* v. *Hoagland*, 93 Pa. Super. 274, 276, points in the direction we urge. Thus, after explaining in the passage quoted by the district court (A. 23) that the general blackmail statute (18 Pa. Stat. 4801) is not concerned with common law extortion, the Pennsylvania court immediately proceeded to say it punishes one who "levies blackmail or extorts money", and defined extortion in the modern, comprehensive sense.

The court below candidly conceded that extortion and blackmail "are often confused in statutory, judicial, and common, language" (A. 22). However, the court then relied on this settled "confusion" as a basis for *distinguishing* between extortion and blackmail for purposes of construing Section 1952. The fact that these terms are commonly used interchangeably, we submit, demonstrates on the contrary at least that Congress did not mean to resuscitate a fine line that law, language, and history have abandoned. Since the word "extortion" can naturally be read as a synonym for "blackmail," if the Court rejects our argument that Congress used the word generically the statute should be construed at least as comprehending those states, like Pennsylvania, which use the term "blackmail" (see App. B, *infra*, p. 29).

[12] See, also, *Commonwealth* v. *Bernstine*, 103 Pa. Super. 518, 157 Atl. 698 (conviction for "extortion" upheld under general "blackmail" statute, 18 Pa. Stat. 4801), affirmed on opinion below, 308 Pa. 394, 162 Atl. 297; *Commonwealth* v. *Kirk*, 141 Pa. Super. 123, 136, affirmed, 340 Pa. 346.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the indictments ordered reinstated.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

AUGUST 1968.